(27)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 750

ENGINEERING & RESEARCH CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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INDEX

Table of Citations

Cases

Statutes

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Engineering & Research Corporation prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above case on October 12, 1944, enforcing the order of the National Labor Relations Board against petitioner, Engineering & Research Corporation.

Opinion Below

The decision and order of the National Labor Relations Board appears in the appendix to the National Labor Relations Board's brief (R. 1-9). The opinion of the Circuit Court of Appeals, No. 5256, has not yet been reported (R. 219).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on October 12, 1944 (R. 219). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

Is the Circuit Court of Appeals justified in holding that an employer is guilty of unfair labor practices, as defined by Section 8 (1) and (2) of the Act, 29 U. S. C. A., Section 158 (1) and (2), when the Circuit Court of Appeals has held that there was no substantial evidence that the employer intended to violate the Act, and when there is no evidence that the employees had a reasonable and justifiable cause to believe that they did not have a free, complete and unhampered freedom of choice, and when there is no evidence that the employees had any fear of loss of their jobs or of discrimination by the employer induced by the activities of any employee?

Statutes Involved

Statutes involved are set forth in the appendix, *infra*.

Statement

This case involves a petition of the National Labor Relations Board to enforce its order against the Engineering & Research Corporation requiring the latter to cease and desist from unfair labor practices, as defined in Section 8 (1) and (2) of the National Labor Relations Act, 29 U. S. C. A., Section 158 (1) and (2), to withdraw recognition from the Independent and completely to disestablish it as the bargaining representative of Engineering & Research Corporation employees, and to post certain notices,

and presents for determination the question of the validity of this cease and desist order.

The petitioner, Engineering & Research Corporation, was organized in the District of Columbia in 1930, and was engaged in experimenting in the manufacture of airplanes and making machine tools. In 1936, the organization was incorporated and moved to Riverdale, Maryland, where it is now established. Up to this time, it had in its employ 250-300 men. In 1942, the entire plant was converted to the manufacture of vital war material, and from that date to this has been engaged one hundred per cent in producing war materials. The number of employees had increased to about 1,800 at the time the complaint in this case was filed, and it now employs about 2,800. It has been awarded the Army-Navy "E" for excellence, and also received an additional award of a star for its flag for excellence. During the twelve years of its business, up to 1942 when this complaint was filed, cordial relations existed between management and employees, and there had been no labor dispute between the petitioner and its employees.

A few employees of the petitioner initiated discussions regarding the formation of an independent and unaffiliated union about a month and a half before this dispute arose. The discussions ended in no affirmative action and temporarily the idea was dropped. It is apparent that two employees, Perlstein and Rappaport, heard of this discussion, by rumor or otherwise; and they decided to attempt to organize within the plant a union affiliated with the CIO. Perlstein came to Washington, and had a conference with Mr. Wagner, a CIO organizer (R. 156, 167). Perlstein, et al., under the guidance of Mr. Wagner, then started their campaign (R. 157). In two days the CIO organizers distributed three thousand pamphlets among the employees of the petitioner as they entered the plant (R. 24,

R. 153). Attached to these pamphlets were membership cards in the CIO for signature by the employees (R. 151). In view of the definite and affirmative action on the part of Perlstein, Rappaport and Goss, certain employees of the petitioner revived the idea of establishing an independent and unaffiliated union. It was apparent that they did not care to join or affiliate with the CIO (R. 179, 66). To meet the campaign of the CIO, it was essential that they take immediate, rapid and definite action to determine the consensus of the employees within the plant (R. 66). Both the CIO and the Independent continued their operations and campaigning for membership in their respective organizations within and without the premises of the petitioner. The Independent and the CIO held several meetings outside of the plant, at which the largest attendance of the latter was twenty (R. 24), and the former had as many as one hundred employees present (R. 31). The Independent within a few days secured 1,064 signatures to petitions desiring an unaffiliated and independent union. The CIO campaign fell flat. Disappointed at their inability to organize a majority of the employees, the CIO filed its complaint against the petitioner.

During the campaign by both the CIO and the Independent within and on the property of the petitioner, the President and executive officers of the petitioner were without notice and were possessed of no information which would indicate that such activities were being conducted within the confines of the property of the petitioner, until the circulars were passed out by CIO organizers (R. 82). Next day, the President of petitioner called the superintendents and instructed them as follows: (1) the employees have a right to discuss these things; (2) the superintendents should instruct all their supervisory force not to discuss the matter with any of the workmen; (3)

that it is a matter of their own free will and volition; (4) the company cannot in any way interfere or suggest, advise or coerce them; (5) if any activities or discussion interfere with their work the supervisors and their force shall notify such employees that they will have to stop, and if they do not stop, to take disciplinary action. These instructions were to apply to all employees, irrespective of the union for which they were soliciting (R. 208, 83). The President knew nothing about the Independent until counsel for petitioner received a petition from attorney for the Independent (R. 83).

Specifications of Errors to Be Urged

The Circuit Court of Appeals erred:

(1) In holding that the National Labor Relations Board is justified in concluding that the employees did not have complete and unhampered freedom of choice which the Act contemplates.

(2) In rendering a decree which is in conflict with what we believe to be a proper construction of the decisions of this Court in *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 80; *N. L. R. B.* v. *Link-Belt Company*, 311 U. S. 584, 599; and *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 520.

(3) In enforcing the order of the National Labor Relations Board.

Reasons for Granting This Writ

This case presents an important question with respect to the construction of the decisions of this Court in the *I. A. M.* case, the *Link-Belt* case, and the *Heinz* case, wherein the doctrine of *respondeat superior*, the objective theory, was supplanted by a new subjective theory which, in effect,

has caused the lower court to make the responsibility of the employer turn upon what the employees themselves believe to be the authority of the supervisory employees, irrespective of the actual scope of supervisory employees' authority, expressed, implied or apparent.

When a major labor union brings charges against an employer, the latter has three hurdles to overcome; first, the National Labor Relations Board, which has on numerous occasions been inconsistent in its findings; second, Circuit Courts, which have handed down conflicting decisions on the question of employer-employee rights with relation to labor organizations; and, third, the decision of this Court in the *I. A. M.* and *Link-Belt* cases, wherein the Court has enunciated a new subjective theory that liability for an employer's violation of the National Labor Relations Act must turn upon whether the employees believed that the solicitors for a labor organization were acting for or on behalf of management.

If the Circuit Court is to apply the doctrine of the Supreme Court as laid down in these cases, then, in order to evaluate the actual consequences, it is important and essential that it determine just what reasonable and justifiable impressions may have been made on the minds of the employees by reason of the acts or statements of supervisory employees.

Do the *I. A. M.* and *Link-Belt* and *Heinz* cases apply to all National Labor Relations Board cases, or do they apply only when the Board has found that the employer was guilty of unfair labor practices by interference, restraint, coercion and domination of the formation of the union by means of threats of discharge, transfer, discipline or discrimination against the employees, or other change in the status of an employee.

In *International Association of Machinists* v. *N. L. R. B.*, *supra*, this Court said:

> "Thus where the employees would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of the management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contemplated * * * but they did exercise general authority over the employees and were in a strategic position to translate to their subordinates the policies and desires of the management. It is clear that they did exactly that."

In *N. L. R. B.* v. *Link-Belt Company*, *supra*, this Court said:

> "As we indicated in *International Asso. M. T. D. L. M. L.* v. *National Labor Relations Bd.*, *supra*, the strict rules of respondeat superior are not applicable to such a situation. If the words or deeds of the supervisory employees, taken in their setting, were reasonably likely to have restrained the employees' choice and if the employer may fairly be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere. If the employees 'would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of the management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contemplates.' *International Asso. M. T. D. L. M. L.* v. *National Labor Relations Bd.*, *supra*. Here such inferences were wholly justified."

And in *H. J. Heinz Co.* v. *N. L. R. B.*, *supra*, this Court said:

> "There is evidence supporting the Board's conclusion that the employees regarded the foremen and group leaders as representatives of the petitioner and that a

> number of employees signed as members of the Association only because of the fear of loss of their jobs or of discrimination by the employer induced by the activities of the foremen and group leaders."

and this Court held that, by reason of this fear on the part of the employees, such action prejudiced the rights of the employees to self-organization, and the test of the *I. A. M.* and *Link-Belt* cases was held to apply.

The facts in the *I. A. M.* and *Link-Belt* cases show that the employees were threatened with discharge, were actually discharged for refusal to join the I. A. M. or the Independent, and were in fear of discharge if they engaged in union activities. In the *Heinz* case, the employees were in fear of loss of job if they did not join the Independent, and were threatened with discharge if they joined the union. In the *I. A. M.* case, the vice-president, general manager and works manager actively participated in acts against the CIO. In the *Heinz* case, the president was advised of the situation and took no action.

In *N. L. R. B.* v. *Pacific Gas and Electric Company*, 118 F. (2d) 780 (C. C. A. 9), after discussing the *I. A. M.*, *Link-Belt* and *Heinz* cases, the court said:

> "* * * * if a reasonable man, in the position of an employee, could conclude or infer that the acts and deeds of the supervisory officials represented the attitude of the employer, then the Board may find that such acts and deeds were the acts and deeds of the employer.
>
> "If none of the statements made could constitute interference, restrain or coercion of the employer, then respondent has not been guilty of any unfair labor practices."

In *N. L. R. B.* v. *Cities Service Oil Company*, 129 F. (2d) 933 (C. C. A. 2), where five employees were discharged because of union activities and refusal to join the Inde-

pendent, the court, after quoting from the *I. A. M.* case, said:

> "Test of respondent's activities for its subordinates is as held in the *I. A. M.* case, whether the employees had just cause to believe that the company approved of those activities * * *"

In *North Carolina Finishing Company* v. *N. L. R. B.*, 153 F. (2d) 714 (C. C. A. 4), where employees were threatened with discharge if they engaged in union activities and one employee was discharged because of union activities, the court said:

> "Nor are we unaware of the principle announced by us in *N. L. R. B.* v. *Mathieson Alkali Works*, 114 F. (2d) 796, 802, that '* * * mere isolated expressions of minor supervisory employees, which appear to be nothing more than the utterances of individual views, not authorized by the employer and not of such a character or made under such circumstances as to justify the conclusion that they are an expression of his policy, will not, ordinarily, justify a finding against him,"

and the court observed that that doctrine did not fit the facts in that case, apparently for the reason that employees were discriminated against by discharge and threats of discharge.

In these Circuit Courts of Appeals decisions, emphasis is placed, as we believe it should be, on (1) what a reasonable man could conclude and infer, (2) that they should have a just cause to believe that they do not have a free choice, and (3) that without interference, restraint or coercion by the employer, the latter could not be held guilty of unfair labor practices.

There is no evidence or proof in the record that any statements made by any employee, supervisory or not, led

to any injury or fear of injury to any employee by discharge, transfer, discipline, coercion or any other discriminatory acts by the employer or any employee.

The Board and the Circuit Court of Appeals finds that leadmen and instructors represent management. This is not substantiated by the evidence which shows that leadmen and instructors are *group leaders* and *setup men* (R. 38, 39, 42, 48, 59, 65, 72, 73, 85, 86, 130, 135, 193).

In *Ranco, Inc.*, 57 N. L. R. B. No. — decided 7/20/44, the Board held that group leaders and setup men were merely higher skilled employees who received higher rates of pay, distributed work to other employees, and reported to their supervisors inefficiency of employees, were paid on hourly basis, received compensation for overtime, had no authority to hire or discharge and did not attend supervisory meetings. On this basis the Board found that *group leaders* and *setup men* were not supervisory employees and were not acting with the support and approval of management, and the Board held that the company could not be charged with unfair labor practices attributed to these employees and dismissed the complaint and reversed the finding of the Trial Examiner. This decision was rendered less than one month prior to the filing of the Board's brief in the instant case. How the Board could find that the employees of the Engineering & Research Corporation, acting as *group leaders* and *setup men*, represented management, after the decision in the *Ranco* case, is beyond our ken.

As to the activities of the elected officers of the Independent referred to by the Circuit Court of Appeals:

Anders, an inspector, was elected president of the Independent and resigned. The National Labor Relations Board, in *Consolidated Vultee Aircraft Corporation*, 58 N. L. R. B. No. 191, decided 10/14/44, has held that inspectors are not supervisory employees.

Van Horn was a clerk in the Accounting Department, was promoted to supervisor of accounts, was elected vice-president of the Independent and resigned.

Huber, referred to as an assistant purchasing agent, was only a glorified typist, without authority, and acted under the supervision of his superior.

Conclusion

Therefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit should be granted.

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